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No. 80-1199

In the Supreme Court of the United States

OCTOBER TERM, 1980

THE AMERICAN TOBACCO COMPANY, ET AL.,
PETITIONERS
v.
JOHN PATTERSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion under Fed. R. Civ. P. 60(b)(5) in denying petitioners' motion to reopen that portion of a 1974 judgment concerning petitioners' discriminatory lines of employee progression, which were established after the effective date of Title VII of the Civil Rights Act of 1964.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statutes and rule involved 2

Statement 3

Argument 6

Conclusion 13

TABLE OF AUTHORITIES

Cases:

Alexander v. *Aero Lodge No. 735*, 565 F. 2d 1364, cert. denied, 436 U.S. 946 10

Browder v. *Director, Ill. Dept. of Corrections*, 434 U.S. 257 7

California Brewers Ass'n v. *Bryant*, 444 U.S. 598 7

Columbus Board of Education v. *Penick*, 443 U.S. 449 9

EEOC v. *Safeway Stores, Inc.*, 611 F. 2d 795, cert. denied, 446 U.S. 952 7

Franks v. *Bowman Transportation Co.*, 424 U.S. 747 ..... 6, 11, 12

Fuhrman v. *Livaditis*, 611 F. 2d 203 7

Griggs v. *Duke Power Co.*, 401 U.S. 424 ..... 9, 12

Hameed v. *International Ass'n of Bridge Workers, Local Union No. 396*, 637 F. 2d 506 8

Page

Cases—Continued:

Hazelwood School District v. *United States*, 433 U.S. 299 5

International Brotherhood of Teamsters v. *United States*, 431 U.S. 324 ..... 5, 8, 9, 10

McDonnel-Douglas Corp. v. *Green*, 411 U.S. 792 12

Nashville Gas Co. v. *Satty*, 434 U.S. 136 12

Sears v. *Atchison, Topeka & Santa Fe Ry.*, Nos. 78-1995, 78-1997, 78-1998 (10th Cir. Mar. 11, 1981) 8

Swint v. *Pullman-Standard*, 624 F. 2d 525 ..... 8, 9

Trans World Airlines, Inc. v. *Hardison*, 432 U.S. 63 10

United Air Lines, Inc. v. *Evans*, 431 U.S. 553 ..... 5, 10

United States v. *Georgia Power Co.*, 634 F. 2d 929 9

United States v. *Swift & Co.*, 286 U.S. 106 7

United Steelworkers v. *Weber*, 443 U.S. 193 12

Page

Statutes and rule:

Civil Rights Act of 1964, Title VII, 42 U.S.C. 2000e *et seq.* 3

Section 703(a)(2), 42 U.S.C. 2000e-2(a)(2) ... 2

Section 703(c)(2), 42 U.S.C. 2000e-2(c)(2) ... 2

Section 703(h), 42 U.S.C. 2000e-2(h) 2, 5, 6, 7, 9, 10, 12, 13

Fed. R. Civ. P. 60(b)(5) 2, 5, 7, 13

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OPINIONS BELOW

The en banc decision of the court of appeals is reported at 634 F. 2d 744. Earlier decisions of the court of appeals are reported at 586 F. 2d 300 and 535 F. 2d 257. The decisions of the district court are unofficially reported at 18 Fair Emp. Prac. Cas. (BNA) 371, 11 Fair Emp. Prac. Cas. (BNA) 577, and 8 Fair Emp. Prac. Cas. (BNA) 778.

JURISDICTION

The judgment of the court of appeals was entered on November 18, 1980. The petition for a writ of certiorari was filed on January 16, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND RULE INVOLVED

Section 703(a)(2) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(2), provides in relevant part:

> It shall be an unlawful employment practice for an employer * * * to limit, segregate, or classify his employees * * * in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race * * * [or] sex * * *.

2. Section 703(c)(2) of Title VII, 42 U.S.C. 2000e-2(c)(2), provides in relevant part:

> It shall be an unlawful employment practice for a labor organization * * * to limit, segregate, or classify its membership or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment because of such individual's race * * * [or] sex * * *.

3. Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h), provides in relevant part:

> Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority * * * system, * * * provided that such differences are not the result of an intention to discriminate because of race [or] sex * * *.

4. Rule 60(b)(5) of the Federal Rules of Civil Procedure provides in relevant part:

> On motion and upon such terms as are just, the court may relieve a party * * * from a final judgment, order, or proceeding * * * [if] it is no longer equitable that the judgment should have prospective application.

STATEMENT

In 1973, the Equal Employment Opportunity Commission filed this employment discrimination action in the United States District Court for the Eastern District of Virginia, alleging that petitioners' promotion and seniority practices had confined blacks and women to low paid, segregated jobs, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* The trial court consolidated the Commission's suit with a private Title VII class action suit filed by respondent John Patterson and four other black employees. Patterson's complaint was based on charges of race discrimination filed with the EEOC in April 1969, with regard to petitioner American Brands' two cigarette and pipe tobacco manufacturing plants in Richmond, Virginia.

In 1974, following an extensive trial, the district court entered a declaratory judgment against petitioners, concluding that their promotions and seniority practices violated Title VII. The court found that until 1963, jobs at the two plants were expressly segregated on the basis of race and sex. Blacks were relegated to low paying jobs in the prefabrication departments and were excluded from supervisory positions and better paying production jobs in the fabrication department. Likewise, women were excluded from the better paying male jobs. In 1963, the company eliminated its overt segregative assignment policy. The company continued, however, to deny blacks and women promotions into the jobs from which they had previously been excluded on an express basis. Between 1963 and 1968, the company accomplished this result by means of a standardless, subjective evaluation system supervised by white

males. In 1968, petitioners developed a posting and bidding system and established six "lines of progression." Each line of progression required that an employee work in a lower level job in that line before advancing to the next level job in the same line (8 Fair Empl. Prac. Cas. (BNA) 778, 789-790 (1974); 535 F. 2d 257, 263, 265 (1978)).

The district court determined that petitioners' promotion and seniority practices had resulted in a significant pattern of race and gender segregation similar in many respects to the pattern established by petitioners' pre-1963 policy of overt discrimination. Thus, as of 1973, eight years after the enactment of Title VII, approximately 81% and 92% respectively of the hourly-paid production workers at the two plants' prefabrication departments were black. Similarly, in 1973, only men had been employed at 55 out of the 243 production job classifications at the two plants, while only women had been employed at 12 other positions. Moreover, white males held virtually every supervisory position and the vast majority of fabrication jobs at both plants (8 Fair Empl. Prac. Cas. (BNA) at 778-795; 535 F. 2d at 263-264, 270-272). Concluding that the lines of progression had perpetuated past race and gender discrimination without a business necessity, the court enjoined petitioners from continuing to use the lines of progression (8 Fair Empl. Prac. Cas. (BNA) at 790; 535 F. 2d at 265).

2. On an initial appeal in 1976, the court of appeals affirmed the district court's findings and, with certain minor exceptions regarding the relief to be awarded, it upheld the district court's decree. The court of appeals held that the "record amply supports the district court's finding that after the effective date of Title VII [petitioners] discriminated in the[ir] promotional policies" (535 F. 2d at 264). In particular, the court of appeals agreed with the trial court that the discriminatory evaluations of white males supervisors, the

failure to provide definite job descriptions, the six unnecessary and discriminatory lines of progression, and the forfeiture of accrued seniority as a condition of transferring from one plant to the other all violated Title VII. 535 F. 2d at 263-265. The court remanded the case for individual back pay proceedings. See 18 Fair Empl. Prac. Cas. (BNA) 377 (1977). Thereafter, this Court denied petitioners' first petition for a writ of certiorari. See 429 U.S. 920 (1976).

3. Subsequently, while the case was pending on remand, petitioners filed a motion to vacate the district court's 1974 judgment.[1] Relying on *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324, 353-354 (1977); *United States Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977); and *Hazelwood School District* v. *United States*, 433 U.S. 299 (1977), petitioners argued that their allegedly bona fide seniority systems, including the six lines of progression, did not violate Title VII. The district court denied this motion, stating that petitioners' "post January 15, 1968 seniority system * * * is not a bona fide system under *Teamsters* * * * because this system operated right up to the day of trial in a discriminatory manner * * * [and] had a discriminatory genesis" (18 Fair Empl. Prac. Cas (BNA) at 377). Hence, the court declined to modify its decree.

4. Thereafter, a panel of the court of appeals held that "*Teamsters* require[s] no modification of the relief we approved with regard to job descriptions, lines of progression * * * or supervisory appointments" (586 F. 2d 300, 303 (1978)). The court explained that those employment practices are not part of, or predicated upon, a seniority system and thus do not fall within the narrow scope of Section 703(h). The court remanded the case, however, for

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[1]Petitioner did not identify the basis for their motion. The court below treated petitioners' application as a motion under Rule 60(b)(5) of the Federal Rules of Civil Procedure. See Pet. App. 3 n.1.

further findings with regard to the bona fide nature of petitioners' seniority policy governing inter-plant transfers. The court observed that "[w]hile we agree with the district court that [petitioners'] seniority system would not be bona fide if it either currently served a racially discriminatory purpose or was originally instituted to serve a racially discriminatory purpose," the district court's conclusions regarding the inter-plant transfer seniority policy were not adequately supported by subsidiary findings. 586 F. 2d at 303.

The court of appeals then granted en banc review of this case. The en banc court held that "§703(h) * * * has no application to [petitioners'] job lines of progression policy, whether or not it be considered a 'seniority system' * * * [because] [t]his policy was not in effect at American in 1965 when Title VII went into effect" (Pet. App. 8-9). The court of appeals concluded that the "legislative history of §703(h), as exhaustively analyzed by the Supreme Court in *Teamsters* and *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), conclusively demonstrates that Congress intended the immunity accorded seniority systems by §703(h) to run only to those systems in existence at the time of Title VII's effective date, and * * * to routine post-Act applications of such systems" (Pet. App. 9-10). Because the lines of progression were instituted in 1968 and thus did not create any pre-Act vested rights, the court of appeals declined to disturb this aspect of the 1974 judgment.[2]

ARGUMENT

Petitioners challenge the failure of the courts below to reopen that relatively limited portion of a 1974 judgment

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[2]The en banc court of appeals remanded the case for further proceedings regarding the inter-plant seniority policy (Pet. App. 11-12) and the promotional practice and policies governing supervisory jobs (*id.* at 13-20). These issues are not before the Court.

against petitioners concerning their so-called "lines of progression." In particular, petitioners claim (Pet. 5-21) that the court of appeals has misconstrued Section 703(h) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(h), and that these six lines of progression, which were established after the effective date of the Act and which, at a minimum, perpetuated without business justification the effects of prior overt discrimination, are lawful. It is well settled, however, that a district court has broad equitable discretion under Fed. R. Civ. P. 60(b)(5) in determining whether a prior judgment should be reopened to avoid extreme hardship or unfairness. See, *e.g.*, *Browder* v. *Director, Ill. Dep't of Corrections*, 434 U.S. 257, 263 n.7 (1978); *United States* v. *Swift & Co.*, 286 U.S. 106, 119 (1932); *EEOC* v. *Safeway Stores, Inc.*, 611 F. 2d 795, 799 (10th Cir. 1979), cert. denied, 446 U.S. 952 (1980); *Fuhrman* v. *Livaditis*, 611 F. 2d 203, 204 (7th Cir. 1979). No abuse of discretion occurred here.

1. Even assuming that petitioners' six lines of employee progression fall within the narrow scope of Section 703(h),[3] petitioners are not entitled to relief under Rule 60(b)(5). As petitioners concede (Pet. 7-9), Section 703(h) encompasses

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[3]The panel of the court of appeals correctly held that these lines of progression are not seniority systems at all (586 F. 2d at 303). Petitioners' lines of progression apparently require only that an employee may not obtain a higher job in the particular line of progression until he has served at least one day in the job directly beneath the higher job in the same line of progression. This employment practice does not favor employees with greater seniority within a particular job classification, and it discriminates against employees with greater seniority, but who have worked at equivalent jobs in another line of progression or at a lower job in the same line of progression. See Pet. App. 8-9 n.3. In short, the lines of progression do not "allot[] to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." *California Brewers Ass'n* v. *Bryant*, 444 U.S. 598, 606 (1980). Moreover, as we discuss below in point 2, Section 703(h) applies solely to seniority systems established before the effective date of the Act.

only "bona fide" seniority systems that are not the products of intentional discrimination. Thus, in *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977), this Court emphasized that "§703(h) does not immunize all seniority systems" (431 U.S. at 353), but rather applies only to a "bona fide" system that does "not have its genesis in racial discrimination [and that has been] negotiated * * * and maintained free from any illegal purpose" (*id.* at 356). See, *e.g.*, *Hameed* v. *International Ass'n of Bridge Workers, Local Union No. 396*, 637 F. 2d 506, 516 & n.11 (8th Cir. 1980); *Swint* v. *Pullman-Standard*, 624 F. 2d 525, 530 (5th Cir. 1980); *Sears* v. *Atchison, Topeka & Santa Fe Ry.*, Nos. 78-1995, 78-1997, 78-1998 (10th Cir. Mar. 11, 1981).

Here, the record demonstrates that petitioners' lines of progression have their origin in overt discrimination and were part of an array of discriminatory job practices designed to confine blacks and women to lower paying, segregated jobs. See 18 Fair Empl. Prac. Cas. (BNA) at 277; 535 F. 2d at 263-264; 8 Fair Empl. Prac. Cas. (BNA) at 789-795. Prior to 1963, petitioners "overtly segregated employees by race with respect to job assignments, cafeterias, restrooms, lockers, and plant entrances." 535 F. 2d at 263. Indeed, different locals of the same union represented black and white employees. Likewise, petitioners also overtly discriminated on the basis of gender at that time. Moreover, between 1963 and 1968, petitioners maintained this segregation through means of unposted job vacancies and unwritten, subjective and arbitrary job rules administered by white male supervisors. *Ibid.* Finally, in 1968, after the effective date of the Act, petitioners established lines of progression without a business justification and without definite written job descriptions, which predictably resulted in perpetuating the pattern of job segregation that had been created by petitioners' overt discrimination in the past. See 8 Fair Empl. Prac. Cas. (BNA) at 789-795; 535 F. 2d at 264.

In these circumstances, the district court properly concluded that petitioners' lines of progression are not bona fide seniority systems. See *Teamsters, supra*, 431 U.S. at 353, 356; *United States* v. *Georgia Power Co.*, 634 F. 2d 929 (5th Cir. 1981); *Swint* v. *Pullman-Standard, supra*, 624 F. 2d at 530-534. See also *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 465 (1979) ("adherence to a particular policy or practice, 'with full knowledge of the predictable effect of such adherence upon racial imbalance * * * is one factor * * * which may be considered by a court in determining whether an inference of segregative intent should be drawn' "). Because petitioners' lines of progression thus do not fall within the scope of Section 703(h) and because those lines of progression do not serve any business need or other important interest of petitioners, the district court correctly declined to reopen this relatively limited aspect of the 1974 judgment.

2. Furthermore, the court of appeals correctly held that Section 703(h) affords no immunity to the post-Act creation of the lines of progression at issue here, even if they are regarded as a "seniority system" within the meaning of that Section. Section 703(h) provides a limited exception to the discriminatory impact provisions of Title VII for the operation of certain "bona fide seniority * * * system[s]." On its face, however, Section 703(h) neither defines "bona fide" seniority systems nor purports to sanction the post-Act establishment of seniority systems that unlawfully "operate to 'freeze' the status quo of prior discriminatory practices" (*Griggs* v. *Duke Power Co.*, 401 U.S. 424, 430 (1971)). To the contrary, as this Court concluded in *International Brotherhood of Teamsters* v. *United States, supra*, after exhaustive analysis of the language and legislative history of Section 703(h), that provision reflects "the congressional judgment * * * that Title VII should not outlaw the use of *existing seniority lists* and thereby destroy or water down

the *vested seniority rights* of employees simply because their employer had engaged in discrimination prior to the passage of the Act" (431 U.S. at 353 (emphasis supplied)).[4]

Indeed, the legislative history makes clear that Section 703(h) represents a congressional compromise designed to resolve "ambiguities concern[ing] Title VII's impact on *existing* collectively bargained seniority rights * * * [by] allow[ing] for full exercise of *seniority accumulated before the effective date of the Act.*" *Teamsters, supra*, 431 U.S. at

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[4] *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977), on which petitioners rely (Pet. 16-17), is not to the contrary. In *Evans*, the Court considered a seniority system that had been established prior to the effective date of Title VII, whereas the alleged seniority system challenged in this case was created after the effective date of the Act. Moreover, the *Evans* decision held only that a pre-Act seniority system, which was not itself unlawful, does not violate Title VII merely because it perpetuates post-Act discrimination that the plaintiff had failed to challenge in a timely fashion. Although the Court stated that Section 703(h) applies to seniority *decisions* made after the effective date of the Act in accordance with *pre-Act* seniority *systems* (431 U.S. at 560), it did not suggest that Section 703(h) immunizes the post-Act creation of seniority systems that perpetuate the effects of post-Act discrimination. Rather, the Court emphasized that the seniority system at issue in *Evans* did not discriminate between men and women (431 U.S. at 557-558 & n. 10), and that Section 703(h) "does not foreclose attacks on the current operation of seniority systems which are subject to challenge as discriminatory" (431 U.S. at 560).

Likewise, petitioners erroneously rely on *Trans World Airlines, Inc.* v. *Hardison*, 432 U.S. 63 (1977), and *California Brewers Ass'n* v. *Bryant, supra*. Those cases did not concern a seniority system established after the effective date of the Act and did not address the issue presented by this case. Likewise, there is no conflict between the decision below and the decisions in *Hameed* v. *International Ass'n of Bridge Workers, Local Union No. 396, supra*, and *Alexander* v. *Aero Lodge No. 735*, 565 F. 2d 1364 (6th Cir. 1977), cert. denied, 436 U.S. 946 (1978). Not only did those cases not address whether Section 703(h) covers seniority systems created after the effective date of the Act, but the Sixth and Eighth Circuits emphasized that Section 703(h) does not in any event immunize a seniority system "established or maintained with an intent to discriminate" 565 F. 2d at 1378; see *Hameed, supra*, 537 F. 2d at 516.

352 (emphasis supplied). In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 759-761 (1976), the Court summarized the pertinent legislative history as follows (emphasis supplied; footnotes omitted):

> The initial bill reported by the House Judiciary Committee as H.R. 7152 and passed by the full House on February 10, 1964, did not contain §703(h). Neither the House bill nor the majority Judiciary Committee Report even mentioned the problem of seniority. That subject thereafter surfaced during the debate of the bill in the Senate. This debate prompted Senators Clark and Case to respond to criticism that Title VII would destroy *existing seniority systems* by placing an interpretive memorandum in the Congressional Record. The memorandum stated: "*Title VII would have no effect on established seniority rights. Its effect is prospective.*" Senator Clark also placed in the Congressional Record a Justice Department statement concerning Title VII which stated "[I]t has been asserted that Title VII would undermine vested rights of seniority. This is not correct. *Title VII would have no effect on seniority rights existing at the time it takes effect.* Several weeks thereafter, following several informal conferences among the Senate leadership, the House leadership, the Attorney General and others * * * a compromise substitute bill prepared by Senators Mansfield and Dirksen, Senate majority and minority leaders respectively, containing §703(h) was introduced on the Senate floor. Although the Mansfield-Dirksen substitute bill, and hence §703(h), was not the subject of a committee report, * * * Senator Humphrey, one of the informal conferees, later stated during debate on the substitute that *§703(h) was not designed to alter the meaning of Title VII generally but rather "merely clarifies its present intent and effect."*

Hence, nothing in the language or legislative history of Section 703(h) suggests that Congress intended to extend the protection accorded seniority systems existing at the time of the enactment of Title VII to the post-enactment creation of seniority systems that constitute "arbitrary and unnecessary barriers [which] operate invidiously to discriminate." *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 431. Petitioners' unwarranted interpretation of Section 703(h) would upset the balance, established by Congress, between legitimate pre-Act seniority expectations and Title VII's overriding goal of eliminating discrimination. See also *United Steelworkers* v. *Weber*, 443 U.S. 193, 200-220 (1979); *Franks* v. *Bowman Transportation Co., supra*, 424 U.S. at 774-779 (seniority expectations do not justify denial of relief to the victims of unlawful discrimination).[5]

In sum, the court of appeals correctly concluded that Section 703(h) was not meant to encourage the creation of seniority systems that " 'freeze' the status quo of prior discriminatory practices" (*Griggs* v. *Duke Power Co., supra*, 401 U.S. at 430), thereby defeating the congressional purpose underlying Title VII to eliminate "practices and devices which have fostered racially stratified job environments * * * ." *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792,

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[5]Petitioners suggest (Pet. 9-10) that the decision below would somehow affect the ability of employers and unions to modify seniority systems for the purpose of affirmative action or to respond to changes in the economy or industry. But it is well settled that employers and union may "voluntarily * * * modify a seniority system to the end of ameliorating the effects of the past * * * discrimination." *Franks* v. *Bowman Transportation Co., supra*, 424 U.S. at 779. See *United Steelworkers* v. *Weber, supra*. Likewise, Title VII does not prohibit employment practices either that are required by business necessity or that do not intentionally or effectively discriminate on the basis of race or other impermissible classifications. See, *e.g.*, *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 431; *Nashville Gas Co.* v. *Satty*, 434 U.S. 136, 143 (1977).

800 (1973). That decision is consistent with the decisions of this Court construing Section 703(h), and does not conflict with any decision of any court of appeals. Moreover, because the lines of progression at issue here served to perpetuate the effects of post-Act discriminatory practices, the decision below was correct even if Section 703(h) might arguably be thought to afford a measure of protection to the post-Act creation of seniority systems in other circumstances. Particularly in light of the collateral nature of petitioners' Rule 60(b)(5) challenge and the strong evidence of purposeful discrimination concerning petitioners' lines of progression, further review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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